United Nations AT/DEC/1122

Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 1122

Case No. 1235: LOPES BRAGA Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of: Mr. Mayer Gabay, Vice-President, presiding; Mr. Spyridon Flogaitis; Ms. Jacqueline R. Scott;

Whereas at the request of Rubens Lopes Braga, a staff member of the International Trade Centre, United Nations Conference on Development and Trade/World Trade Organization (hereinafter referred to as the ITC), the President of the Tribunal, with the agreement of the Respondent, extended to 31 December 2001 the time limit for the filing of an application with the Tribunal;

Whereas, on 5 December 2001, the Applicant filed an Application containing pleas which read as follows:

"II: PLEAS

...

(b) Decision contested: Decision of the Secretary-General agreeing with the Geneva Joint Appeals Board's recommendation, conveyed by letter dated 20 June 2001 ...;

(c) A reasonable financial compensation to be decided upon by the Tribunal;

..."

Whereas at the request of the Respondent, the President of the Tribunal granted an extension of the time limit for filing a Respondent's answer until 30 April 2002 and periodically thereafter until 31 August 2002;

Whereas the Respondent filed his Answer on 19 August 2002;

Whereas the Applicant filed Written Observations on 1 October 2002;

Whereas the facts in the case are as follows:

The Applicant entered the service of ITC on 3 September 1978, on a one-year fixed-term appointment at the L-3 level as a Market Development Adviser, Market Development, Technical Division. After a number of contract extensions his appointment was made permanent on 1 January 1991. At the time, he held the P-3 position of Trade Promotion Officer, Technical Co-operation, Office for Asia-Pacific, Latin America and the Caribbean. On 1 April 1991, the Applicant was promoted to the P-4 level.

On 31 October 1997, a vacancy announcement was issued for the L-5 Level post of Senior Adviser on the Institutional Aspects of Trade Promotion (ITC/PVN/12/97). The vacancy announcement was reissued on 1 December 1997 and again on 31 March 1998. On 30 December 1997, the Applicant applied for the post but, on 20 July 1998, was informed that his application had not been retained.

On 7 September 1998 a vacancy announcement was issued for the P-5 level post of Chief, Office for Asia-Pacific, Latin America and the Caribbean, ITC (OAPLAC). The Applicant applied for this post on 6 November 1998. One of the job prerequisites set forth in the announcement was the possession of an "undergraduate degree preferably at the advanced level", a qualification the Applicant possessed. The Applicant was interviewed for the vacancy in February 1999, approximately one month prior to the meeting of the Joint Appointments and Promotion Board (JAPB) by its Review Panel.

On 28 December 1998, a vacancy announcement was issued for the P-5 level post of Chief, Trade Research and Business Intelligence, Division of Product and Market Development, Market Analysis Section, also at ITC, (MAS). On 29 January 1999, the Applicant applied for this post as well. No interviews were conducted. No external candidates were under consideration. In the interim however, a staff member was assigned to the post as Officer-in-Charge for one month.

On 9 March 1999, the Review Panel had short-listed five candidates for the post of Chief, OAPLAC including the Applicant. On 10 March, the staff representative to the JAPB resigned and a replacement appointed.

At its 19 March 1999 meeting, the Review Panel considered the candidates for both the OAPLAC and MAS posts. In addition to permanently retaining the Officer-in Charge then currently in place in the MAS position, it selected the candidate for the OAPLAC post as well. The candidate selected for the OAPLAC post however, did not possess the required academic qualifications for the post specified in the vacancy announcement, namely, an undergraduate degree.

At its meeting on 24 March 1999, the JAPB endorsed the Review Panel's recommendations. The Applicant was informed on 26 March, that his application had not been retained.

On 24 May 1999, the Applicant requested administrative review alleging that a "pattern of discrimination" existed against him as evidenced by an administrative action of 15 April 1998 admonishing him for publishing an article in an external publication and the 20 July 1998 notification to the Applicant of the decision rejecting him for the L-5 level Senior Advisor position.

On 24 June 1999, a vacancy announcement was issued for the L-5 level post of Senior Adviser on Multilateral Trading System, Functional Advisory Services Section, Division of Trade Support Services (FASS/DTSS). The vacancy announcement was re-issued on 26 July. The Applicant applied, but on 9 December, was informed that his application had not been retained.

On 9 August 2000, the Applicant lodged an appeal with the Joint Appeals Board (JAB). The JAB adopted its report on 17 May 2001. Its considerations, conclusions and recommendations read, in part, as follows:

"**Considerations**

52. As far as the procedure followed to replace the resigning staff representative is concerned, the [JAB] considered that even though this procedure was not strictly in line with the one stipulated in the Statutes of the ITC Staff Association, it aimed at filling the institutional vacuum created by the resignation that occurred during the selection process. ...

53. With reference to the date of the interview, the [JAB] considered that the fact that the [Applicant] was heard one month before the first meeting of the

Review Panel, as the four other selected candidates, did not prejudice him. He was indeed short-listed following the first session of the Review Panel.

...

58. The [JAB] could not find any evidence to substantiate the [Applicant]'s claim that all candidates were not fully and fairly considered. It found on the contrary that all had been treated fairly.

59. The [JAB] found that as claimed by the [Applicant], the Officer-in-Charge temporarily assigned has been selected later by the Review Panel to fill the post.

61. The [JAB] noticed that [the ITC rules] had been fully respected, to the extent that the Officer-in-Charge has been assigned to the vacant post for one month. Moreover, it did not find any evidence that this gave him an advantage over the [Applicant] in the consideration of his application.

...

63. *Administrative action and decision reflecting a pattern of discrimination.* The [JAB] examined precisely the arguments the [Applicant] put forward to substantiate his claim and related first to the publication of a discussion paper in March 1998. It was recalled that it is a well-established practice among all staff members of the United Nations to seek approval of the Chief of Section or responsible divisional Director prior to submitting a document for publication. The memorandum, which was sent to the [Applicant] following the publication of this document, was in line with the above well-established practice. In that sense, there is no evidence that it had any influence on the development of his career.

64. Concerning the decision dated 20 July 1998 not to promote the [Applicant] to the post of Senior Adviser on the Institutional Aspects of Trade Promotion, L-5, the [JAB] noted that it could not examine the argument to the extent that it is time-barred.

65. *Administrative decision dated 9 December 1999 not to promote the [Applicant] to the post of Senior Adviser on Multilateral Trading System, L-5, [FASS/DTSS].* The [JAB] noted that the [Applicant] added this decision to the previous appeals on 16 February 2000, but had not sent any letter to the Secretary-General requesting review of this administrative decision, as required in Staff Rule 111.2(a).

66. The [JAB] found therefore that a constitutive element of an appeal was lacking, and that it could not go further into the consideration of the case.

Conclusions and Recommendations

67. On the basis of the evidence and information available to it, the [JAB] is unable to conclude that the [Applicant] was not properly and fairly considered in the different promotion exercises within ITC.

68. Accordingly, the [JAB] makes **no recommendation** in support of the present appeal."

On 20 June 2001, the Under-Secretary-General for Management transmitted a copy of the report to the Applicant and informed him that the Secretary-General

agreed with the JAB's findings and conclusions and had decided to accept the JAB's unanimous recommendation and to take no further action on his appeal.

On 5 December 2001, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant's principal contentions are:

1. The Respondent has not duly and fully considered the applications of the Applicant for vacancies and has consistently failed to meet its burden of proof against the objections and complaints raised by the Applicant.

2. The Respondent has not properly observed the pertinent UN Staff Regulations, Rules, Procedures and administrative instructions, and the ITC's Personnel Policy Guidelines and Procedures, resulting in a number of administrative actions and decisions that have negatively affected the development of his professional career and tainting the Director-General's decision of 20 June 2001.

3. The JAB failed to consider the evidence of a pattern of discrimination against him, as shown by a series of rejections of his applications for P-5 vacancies, by other administrative actions and decisions, and by the attitude of the ITC Management, which tainted the Director-General's decision of 20 June 2001.

Whereas the Respondent's principal contentions are:

1. The Applicant had no right to promotion but only to full and fair consideration for promotion. The Applicant was properly considered for promotion, and his rights were not violated by the decisions not to select and promote him to the two P-5 posts.

2. The contested decisions were not improperly motivated or founded on extraneous factors.

3. The appeal as it relates to the decisions of 20 July 1998 is time-barred. The appeal as it relates to the decision of 9 December 1999 is not properly before the Tribunal.

The Tribunal, having deliberated from 4 July to 24 July 2003, now pronounces the following Judgement:

I. The Applicant seeks review of two administrative decisions not to promote him from his P-4 level post to one of two P-5 level positions in ITC: (1) Chief, Office for Asia-Pacific, Latin America and the Caribbean, and (2) Chief, Trade Research and Business Intelligence. The Applicant also requests that a third post to which he had applied and from which he had been rejected -- Senior Advisor on Multilateral Trading System, at the L-5 level -- be included in his appeal. Fearing that his third claim might be non-receivable, the Applicant, in the alternative, seeks to use the non-promotion as evidence of a pattern of discrimination and prejudice against him.

II. With respect to the post of Chief, Office for Asia-Pacific, Latin America and the Caribbean, the Applicant asserts that the selection process that led to the promotion of another internal candidate was not undertaken in accordance with the rules contained in ITC's Personnel Policy Guidelines and Practices (the "Guidelines and Practices"). He also contends that criteria used for the selection process were in violation of the Guidelines and Practices. With respect to the post of Chief, Trade Research and Business Intelligence, he contends that the procedure to fill the post did not respect the requirement for fair competition. With respect to the third post, Senior Advisor on Multilateral Trading System, the Applicant asserts that the decision to hire an external candidate older than 50 years of age violated the ITC Guidelines limiting recruiting of external candidates to 50 years, in the case of P-5 level positions.

III. The Tribunal's task is to determine whether the Respondent's decisions not to promote the Applicant were a proper exercise of its discretion or whether these decisions were vitiated by prejudice or other extraneous factors, including procedural irregularities, that denied the Applicant full and fair consideration for the posts for which he was rejected.

The Tribunal has consistently recognized the considerable latitude of discretion that the Secretary-General has in promoting and in filling vacancies in the Secretariat (see Judgment No. 362, *Williamson* (1986)). Thus, qualifications, experience, favourable performance reports, and seniority are appraised freely by the Secretary-General, and therefore cannot be considered by staff members as giving rise to any expectancy of promotion. (See Judgement No. 955, *Draz* (2000) citing Judgement No. 411, *Al-Ali* (1988)).

This discretionary power of the Secretary-General to evaluate and promote candidates, however, is not without boundaries -- the Administration's discretion shall be reviewed when there are allegations of abuse of discretion, procedural irregularities, bias, prejudice or discrimination. (See Judgement 1056, *Katz* (2002)).

IV. The Tribunal addresses first the Applicant's contention that the selection process that led to the denial of the promotion of the Applicant to Chief, Office for Asia-Pacific, Latin America and the Caribbean, was not in accordance with the Guidelines and Practices. The Applicant asserts that he was interviewed for the post one month before the JAPB was convened. This was in direct contravention to paragraph 23 of the Guidelines and Practices, which states that the Review Panel will advise on applicable rules and procedures, undertake the review of eligible internal candidates and qualified external candidates and "will thereafter prepare a list of qualified and eligible internal applicants as well as qualified external candidates subject to reference checks and to be called for interviews". The Respondent concedes that the Review Panel did conduct a limited number of interviews prior to the formal meeting of the Panel, but asserts that the interview was not closed when the meeting was held. He also contends that the Applicant was not harmed, because the Applicant was "short-listed" after the interview.

The Applicant also asserts that the Respondent did not follow his own procedures when one of the members of the JAPB resigned. Pursuant to paragraph 23 of the Guidelines and Practices, elections must be held to fill the JAPB vacancy. Instead, an unelected ITC staff member was designated to participate in the JAPB meeting, and the Respondent held elections thereafter. The Respondent concedes that it did indeed deviate from the rules required by the Guidelines and Practices regarding replacement of a resigning member, but argues that it eventually held elections, and the interim member appointed was elected as an alternate member.

V. The Applicant further alleges that, with respect to the post of Chief, Office for Asia-Pacific, Latin America and the Caribbean, the criteria used for the selection process, as described in the Guidelines and Practices were not respected. Specifically, the Applicant alleges that objective criteria of evaluation were not used -- the Applicant challenges the selection of the successful candidate on the basis that the successful candidate did not possess an undergraduate degree, as required by the vacancy notice. "The Tribunal's jurisprudence emphasizes that it is not the

Tribunal's role to substitute its judgment for that of the Secretary-General, but merely to ascertain whether the Secretary-General's duty to give each candidate full and fair consideration has been reasonably fulfilled. (See Judgement No. 447, *Abbas* (1989).) Once called seriously in to question, however, the Respondent must be able to make at least a minimal showing that the Applicant's statutory right was honoured in good faith, in that the Respondent gave it's 'fullest regard' to it". See Judgement No. 362, *Williamson* (1986). (See Judgements No. 447, *Abbas* (1989) and No. 490, *Murphy* (1990).)

The vacancy notice did indeed require an "undergraduate degree preferably at the advanced level", and the Respondent provides no evidence that the successful candidate possessed the requisite academic degree; the Respondent merely asserts that academic qualifications are only one factor in the decision-making process. Based on the record, it would appear that the Applicant, who did possess the requisite "undergraduate degree preferably at the advanced level" satisfied the threshold requirements of the vacancy but was rejected, while the successful candidate who did not possess the requisite minimum academic qualifications got the job, notwithstanding his inadequate qualifications. The Tribunal finds that the Respondent's failure to follow its own procedures; i.e., to apply objective criteria of evaluation in a consistent manner, was a violation of the Applicant's right to be fully and fairly considered for the post and irreparably harmed the Applicant. In reaching this decision, however, the Tribunal notes that it expresses no independent opinion as to whether the possession of an academic degree was essential to the performance of the tasks of the post in question. Had the Respondent advertised the post as preferring an undergraduate degree, rather than requiring one, the Respondent would have been free to give the possession of the degree, or lack thereof, whatever weight it chose. By advertising the post, however, as one that required an undergraduate degree, the Respondent made the degree a pre-requisite to selection for the post and cannot now be heard to argue that the possession of the degree was but one factor in its determination. To allow otherwise harms not only the Applicant, who was misled and not fairly considered by objective criteria for the position, but also harms all those putative applicants who did not apply because they did not possess an undergraduate degree.

VI. The Tribunal has previously held that formal procedures are safeguards which must be strictly complied with. The failure of the Respondent to adhere to its own

rules, the adherence to which is strictly and solely within the power of the Respondent, represents an irregularity which amounts to a violation of the Applicant's right to due process, for which the Applicant should be compensated. (See Judgement No. 1047, *Helke* (2002).)

VII. With respect to the Applicant's contentions regarding the post of Chief, Trade Research and Business Intelligence, the Tribunal rejects the Applicants contentions that the procedure adopted to fill the post did not respect the requirement for fair competition. The Respondent's decision to fill temporarily the post, for a period of one month, with a staff member and then to fill permanently that post with the same staff member was within the purview of Paragraph 11 of the Guidelines and Practices. The decision not to conduct interviews was also within the Respondent's right, because there were no external candidates. The Applicant has provided no evidence to support his allegation that he suffered unfair competition.

VIII. With respect to whether a discretionary decision, such as the decision not to promote the Applicant, has been tainted by prejudice, discrimination or improper motive the burden of proving such prejudice or improper motive is on the Applicant (see Judgment No. 834, *Kumar* (1997). The Tribunal finds that the Applicant has failed to provide sufficient evidence to support his claims that the Respondent's decisions were motivated by prejudice, discrimination or improper motive.

IX. The Tribunal agrees with the JAB's conclusion and finds that the Applicant's claims relating to the Respondent's decision not to promote the Applicant to the post of Senior Advisor on Multilateral Trading System, are not receivable. The Applicant had not requested of the Secretary-General review of this matter, as required by staff rule 111.2(a), and, therefore, a constitutive element of this claim is lacking.

For the foregoing reasons, the Tribunal:

1. Orders the Respondent to pay to the Applicant six months net based salary for the violation of his due process rights stemming from procedural irregularities engaged in by the Respondent;

2. Rejects all other pleas.

(Signatures)

Mayer **Gabay**
First Vice-President

Spyridon **Flogaitis**
Member

Jacqueline R. **Scott**
Member

Geneva, 24 July 2003

Maritza **Struyvenberg**
Executive Secretary

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